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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 854

JOHN WALLACE, Petitioner

vs.

A. B. FOSTER, Sheriff of Fulton County, Georgia, Respondent

On Petition For Writ of Certiorari to The Supreme Court of Georgia

Brief of Respondent

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, A. B. Foster, Sheriff of Fulton County, Georgia, files this brief in opposition to the petition for the writ of certiorari to the Supreme Court of Georgia, filed in this court by John Wallace, petitioner. The Attorney General of Georgia is counsel for respondent Foster by direction of the Governor of Georgia.

I. STATEMENT OF THE CASE

The petitioner, John Wallace, was indicted, tried and convicted in Coweta County Georgia of the offense of murder and sentenced to death by electrocution. Although peti-

tioner was tried alone, other persons were indicted jointly with him, including Brooks, Gates, Strickland, Sivell and Mobley. The relations of these joint defendants to the case at bar will presently be made apparent.

Following his conviction, the petitioner made a timely motion for new trial which he later amended to attack as erroneous eleven specified rulings of the trial court. This motion for new trial was overruled after argument and the trial court's judment in this respect affirmed on appeal. *Wallace v. The State,* 204 Ga. 676; 51 S. E. 2d 395.

Thereafter, under appropriate state procedure, petitioner made an additional "extraordinary motion" for new trial upon the ground, *inter alia,* that certain material evidence had become available to him since his conviction tending to show that the victim was alive and well in Meriwether County after the infliction in Coweta County of the blows which the State contended produced his death. This motion was accompanied and supported by affidavits of joint defendants Sivell and Mobley who, since the conviction of Wallace, had voluntarily accepted verdicts of guilty with recommendation of mercy and, in consequence, been sentenced to life imprisonment. (R. 36 and 38) Upon the murder trial of Wallace these witnesses were sworn on behalf of petitioner but, acting on advice of counsel (R. 35 and 39), refused to testify for fear of incriminating themselves. This extraordinary motion for new trial was denied by the trial court and its judgment affirmed on appeal, *Wallace v. The State*, 205 Ga. 751; 55 S. E. 2d 145. In its opinion affirming this judgment the Supreme Court of Georgia pointed out that one other joint defendant, Strickland, was shown by the record to have had the same opportunity to know the facts deposed to by Mobley and Sivell and no effort was made to use him as a witness or explain petitioner's failure to do so.

By the instant petition for habeas corpus Wallace sought to have the Superior Court of Fulton County, Georgia, where he was then incarcerated, declare his conviction void as wanting in due process in that:

(a) Brooks and Gates, jointly indicted with petitioner, witnesses for the State, testified falsely and that their false testimony was procured by officers of the State by promises of immunity from prosecution should they waive their constitutional immunity from self-incrimination;

(b) These officers suppressed the testimony of Mobley, Sivell and Strickland by inducing them to claim their immunity from self-incrimination;

(c) The Sheriff of Coweta County, A. Lamar Potts, paid a reward from his personal funds for information against petitioner and, by his partisan activity on behalf of the prosecution, rendered himself incompetent to serve summons upon grand and petit jurors and otherwise function as an officer of the court, which functions he nevertheless undertook to perform;

(d) This sheriff held material witnesses, who had knowledge of facts material to petitioner's defense, incommunicado and denied petitioner's counsel opportunity to consult with them;

(e) False reports, prejudicial to defendant, were circulated by press and radio, thereby denying him the right to a fair and impartial trial. (R. 1-6)

In the trial court the respondent did not demur or otherwise attack the legal sufficiency of the petition. A response was filed to the petition which created issues of fact on many material allegations and set up by way of exhibits the entire record of prior proceedings. (R. 7-12) Upon the issues thus created the trial judge heard evidence and argument and, after consideration, entered judgment denying the writ. (R. 13) The Supreme Court of Georgia affirmed on appeal. *Wallace v. Foster*, 206 Ga. 561; 57 S. E. E. 2d 920; (R. 89). Petitioner now seeks review and reversal of this judgment,

contending that error with respect to the Federal Constitutional question crept into this decision.

II. ARGUMENT AND CITATION OF AUTHORITIES

1. The trial court's judgment upon the facts is amply supported by the evidence and was properly left undisturbed by the Supreme Court of Georgia.

Unlike *Pyle v. Kansas*, 317 U. S. 213, *Mooney v. Holohan*, 294 U. S. 103 or *Hawk v. Olson*, 326 U. S. 271, the trial court did not dispose of the petition for habeas corpus upon the pleadings. By receiving evidence it permitted the petitioner to open an inquiry into the very truth and substance of the causes for his detention. Having heard this evidence, the court passed upon and determined the issues of fact as it was inescapably its duty to do. Our task here would have been simpler had the trial court made separate and detailed findings on each of the controverted facts but such findings are not required under Georgia procedure. The evidence amply supported, if it did not in fact demand, the judgment which was rendered. The testimony alleged to be perjured was reaffirmed as true. The witnesses who gave the testimony thus attacked insisted that they gave it willingly and without coercion and because they wished to testify. In testifying on this hearing to the truthfulness of what they swore at the murder trial and of their freedom from coercion, these witnesses, Brooks and Gates, were sworn on behalf of petitioner and he is concluded by their testimony. Counsel expressly disclaimed entrapment by them. (R. 16) Not only did petitioner's proof fail to establish the falsity of this testimony, but it was entirely deficient in showing that the officers for the State had any reason to believe the testimony to be false.

Testimony of witnesses, Mobley, Sivell and Strickland, alleged to have been suppressed, was shown by petitioner's own evidence to have been withheld because of the advice of counsel of these witnesses and not as the result of some scheming and malevolent purpose of the prosecution. (R. 35 and 39)

No evidence showed that the petitioner was in any way injured by the zealous or even partisan activity of the sheriff nor was any reason shown why this issue could have been raised by appropriate motion for change of venue, by challenge to the array of jurors, or by other appropriate means upon the original trial.

The evidence wholly fails to show diligence or indeed any effort at all by petitioner's counsel to see the witnesses whom it was alleged were held incommunicado, or any application to the trial Judge for leave to confer with the persons so held.

Unfavorable comment by press and radio was not shown to have prejudiced any juror, or to have created an atmosphere of mob domination at the time of the trial. Nor is any reason given why the petitioner's rights in this respect must be asserted by an application for writ of habeas corpus, rather than by timely motion for change of venue or other like motion in the murder trial.

Respondent respectfully insists, therefore, that the findings of fact by the trial Judge should be accepted. *Von Moltke v. Gillies,* 332 U. S. 708, 740. His appraisal of the living record is entitled to respect and reliance. *District of Columbia v. Pace,* 320 U. S. 698; *United States v. Johnson,* 319 U. S. 503, 518; *Williams Manufacturing Co. v. United Shoe Machinery Corporation,* 316 U. S. 364, 367; *Delaney v. United States,* 263 U. S. 568, 589.

2. The use of false testimony deprives one on trial of due process only when it is deliberately used with knowledge of its falsity.

No ruling of the trial court was envoked on the legal sufficiency of the application for habeas corpus. On appeal, however, the Supreme Court of Georgia stated, *Wallace v. Foster,* supra, that on the petition release should be denied as a matter of law. We now suggest that this application might have been successfully attacked as to the first of the grounds relied upon because there is no allegation that the perjured testimony was knowingly and deliberately used. It has never been decided that habeas corpus is available as a

remedy simply to question for a second time the truth of testimony upon which a conviction was had. This court has clearly stated and limited such an attack in *Mooney v. Holohan,* 294 U. S. 103, 112, to those cases where:

> " . . . the State has *contrived* a conviction *through the pretense of a trial* which in truth is but used as a means of depriving a defendant of liberty through a *deliberate* deception of the court and jury by the presentation of testimony *known* to be perjured." (Emphasis supplied)

Pyle v. Kansas, 317 U. S. 213, places the same emphasis on the "knowing use" of such perjured evidence by the State. To the same effect is *Hawk v. Olson,* supra. After the reception of evidence upon the trial of this application it became abundantly clear that the application for the writ failed to charge a knowing use of perjured evidence because petitioner was without evidence to support such a charge rather than because of any technical deficiency in the drafting of pleadings.

3. The refusal of witnesses to testify because of fear of self incrimination does not deny due process to a defendant on trial who might be benefited by their testimony.

Petitioner's argument here that the claim of immunity by Mobley and Sivell deprived him of due process has the charm of novelty. Such immunity from self incrimination is guaranteed them by the Georgia Constitution, Article I, Sec. I, Par. VI, Georgia Code Ann. 2-106 in the following language:

> "No person shall be compelled to give testimony tending in any manner to criminate himself."

Should such a witness fail to claim his immunity and testify voluntarily, his testimony may be used upon a subsequent trial. *Sheppard v. The State,* 68 Ga. App. 127. No express provision of the Federal Constitution purports to guarantee to a defendant the use of the testimony of a witness who is unwilling to incriminate himself, and it can hardly be said in the

light of history that a right to use of such testimony is "implicit in the concept of ordered liberty" and thus guaranteed to him by the Fourteenth Amendment to the United States Constitution. *Palko v. Connecticut,* 302 U. S. 319, 325. Denial to a defendant of such testimony does not "offend some principle of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental." *Snyder v. Mass.* 291 U. S. 105. The due process clause of the Fourteenth Amendment does not withdraw the freedom of a State to enforce its own measures of fairness in the administration of criminal justice unless it offends principles of justice so rooted and so fundamental. *Louisiana v. Resweber,* 329 U. S. 459, 469. Since we cannot say that it is repugnant to the conscious of mankind for a State to compel the trial of one accused of crime although he is denied access to the testimony of witnesses who claim their immunity from self-incrimination, we cannot say that petitioner's trial was wanting in due process for this reason.

4. Habeas corpus is not an appropriate remedy to review those aspects of the trial for murder which could have been properly placed in issue on the murder trial.

As stated by Mr. Justice Douglas in *Eagles v. Samuels,* 309 U. S. 304,

> "It is elementary that habeas corpus may not be used as a writ of error."

United States ex rel Tisi v. Todd, 264 U. S. 131; *Woolsey v. Best,* 299 U. S. 1. Formerly habeas corpus afforded only a bear legal review to determine whether or not the court had jurisdiction and an inquiry into matters *de hors* the record was in no case permitted. The only exception to this rule has been clearly stated in *Waley v. Johnston,* 316 U. S. 101, 104, where the court in substance said that only when "conviction has been in disregard of the constitutional rights of the accused, and *where the writ is the only effective means of preserving his right*" (emphasis supplied) may habeas corpus be used to open inquiry into the intrinsic fairness of proceedings resulting in incarceration, such proceedings being unas-

sailable upon the face of the record. To the same effect are *Moore v. Dempsey,* 261 U. S. 86; *Mooney v. Holohan,* 294 U. S. 103, *Bowen v. Johnston,* 306 U. S. 19; and *Carter v. Illinois,* 399 U. S. 173. It is the absence of adequate State corrective measures that constitutes the denial of due process. *Habeas Corpus in Interstate Rendition,* 47 Col. Law Rev. 470. The alleged disqualification of the sheriff to act on account of prejudice, the denial of access to State's witnesses and the unfavorable comment upon his case by press and radio present matters which, if hurtful to petitioner, could and should have been raised on the murder trial. Among the remedies provided by Georgia for raising such issues are motion for continuance and motion for change of venue. Although there is no express statutory provision which permits it, we submit that the trial court had full authority by order to allow petitioner's counsel to confer with a prisoner awaiting trial on an indictment pending in that court. It was not want of appropriate process, but petitioner's failure to take advantage of available process which prevented these questions from being put in issue.

5. The fact that press and radio commented unfavorably to petitioner, affords no reason for his release on habeas corpus.

Petitioner contends that two cosmopolitan newspapers actively endeavored to prejudice each prospective juror against him by publishing false news stories, editorials and radio broadcasts thereby robbing petitioner of a fair and impartial trial. He contends further that this campaign was continued to his detriment while the Board of Pardons and Paroles was considering the grant or denial of clemency. (Pet. for Cert., pp. 3 and 4, Par. 3.) Petitioner concludes that this conduct of newspapers deprived him of the right to trial by *an impartial* jury as contemplated by the Sixth Amendment to the Constitution of the United States. In his petition for habeas corpus it was also contended that this publicity created an atmosphere so hostile as to place him in danger of mob violence in the event of his acquittal.

It is established beyond all question that the Bill of Rights,

when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states. *Barron v. Baltimore,* 7 Pet. 243; *Feldman v. United States,* 332 U. S. 487, 490; *Adamson v. California,* 332 U. S. 46, 51. The Sixth Amendment applies only to trials in federal courts and the specific guarantees contained therein are not incorporated, as such in the due process clause of the Fourteenth Amendment. *Betts v. Brady,* 316 U. S. 455, 461. Georgia's Constitution, Art. I, Sec. I, Par. V, however, does contain such a guaranty in the identical words of the Sixth Amendment. In felony cases each prospective juror must be examined upon his voir dire and found impartial before he may be put upon the accused, 1933 Code of Georgia, Secs. 59-806, 59-807 (Appendix, 13, 14). It is further provided that change of venue may be granted on timely motion should it appear that an impartial jury may not be obtained in the county where the crime was allegedly committed. 1933 Code of Georgia, Sec. 277-1201. (Appendix 11). When the defendant predicates such motion upon a reasonable danger of lynching or mob violence this statute gives him an unqualified right to have an adverse ruling reviewed by the Supreme Court of Georgia and his trial stayed pending the appeal.

Not only do the pleadings and the evidence wholly fail to show that the trial was mob dominated and but an empty formality according to the tests established in *Moore v. Dempsey,* 261 U. S. 86 and *Frank v. Mangum,* 235 U. S. 309, but they also fail to show any effort to employ the remedies provided or to explain and excuse this failure.

6. The decision of the Supreme Court of Georgia here under review contains no error with respect to the Federal Constitutional question.

From what has been said above it seems abundantly clear that the decision of the Supreme Court of Georgia (R. 89 et seq.) is in complete accord with the pronouncements of this court upon the constitutional question. Neither the petition nor the evidence showed petitioner's right to be released upon habeas corpus. Many of the issues which petitioner

sought to raise are of the type which may have been reviewed fully by writ of error. As to the perjured testimony, it was not alleged to be knowingly used and was not proven to be perjured or coerced. With regard to the alleged suppression of testimony, the application for the writ shows that it was unavailable because of a rightful claim of immunity from self-incrimination, irrespective of the motive which prompted the claim. The evidence shows this immunity was claimed upon advice of counsel and shows no improper acts to indue the claim. The evidence fails to show what the testimony might have been had it been available. The exact issue was raised upon extraordinary motion for new trial, was considered on its merits, and relief denied by the trial court whose judgment was affirmed on appeal. Wallace v. State, 205 Ga. 751; 55 S. E. 2d 145.

CONCLUSION

We, therefore, earnestly submit that petitioner has failed to present a substantial Federal question of importance. The judgment of the Supreme Court of Georgia could be reversed on certiorari only upon determination that both the trial court's finding upon the facts was erroneous as a matter of law, and that the application for the writ stated a good case for petitioner's release. Neither of such findings is warranted by the record in this case.

Respectfully submitted,

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APPENDIX

Georgia Constitution, 1945, Art. I, Sec. I, Par. V.
Georgia Code Ann., Cum. Pkt. Pt.
Sec. 2-105:

"Benefit of counsel; accusation; list of witnesses; compulsory process; trial by jury.—Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel; shall be furnished, on demand, with a copy of the accusation, and a list of the witnesses on whose testimony the charge against him is founded; shall have compulsory process to obtain the testimony of his own witnesses; shall be confronted with the witnesses testifying against him; and shall have a public and speedy trial by an impartial jury."

Georgia Code, 1933,
Sec. 27-1201:

"When and how venue changed.—The defendant in any criminal case in the superior court may move, by petition in writing, for a change of venue, whenever, in his judgment, an impartial jury cannot be obtained in the county where the crime is alleged to have been committed. Upon the motion it shall not be necessary to examine all persons in the county, liable to serve on juries, but the judge shall hear evidence by affidavit or oral testimony in support of or against the motion; and if, from the evidence submitted, the court shall be satisfied that an impartial jury cannot be obtained to try the case, the judge shall transfer it to any county that may be agreed upon by the solicitor general and the defendant or his counsel, to be tried in the county agreed upon. If a county is not thus agreed upon, the judge shall select such county as, in his judgment, will afford a fair and impartial jury to try the case, and have it transferred accordingly. The judge of the superior court of the circuit in which a crime is alleged to have been committed may change the venue for the trial of said case, on his own motion, with or without petition, whenever, in his judgment, the accused party will be lynched, or there is danger of violence being attempted to be committed on

said accused, if carried back, or allowed to remain in the county where the crime is alleged to have been committed. If a motion by petition shall be made by the accused for a change of venue, said judge shall hear the same at chambers, with or without the presence of the accused, at such time and place as he may direct; and if the evidence submitted shall reasonably show that there is probability or danger of lynching, or other violence, then it shall be mandatory on said judge to change the venue to such county as, in his judgment, will avoid such lynching. The petitioner shall have the right to except to the ruling of the court at such interlocutory hearing and the bill of exceptions when signed shall operate as a supersedeas in the trial of said case, until passed on by the Supreme Court: Provided, that said prisoner shall present said bill of exceptions to the judge hearing said motion within six days after the refusal to grant said motion. Said bill of exceptions shall be filed in the office of the superior court clerk of the county of the alleged crime within two days after being signed by the judge, and said clerk shall transmit said bill and the required record of said case as early as possible and not exceeding 10 days from the filing in said office to the Supreme Court. Said case in the Supreme Court shall be heard as soon as possible, taking precedence of all other causes: Provided, that should the Supreme Court not be in session at the time said writ of error is received in said Court it shall be the duty of the clerk of said Supreme Court to at once notify the Chief Justice of said Court, or, in his absence or illness, one of the other Justices of said Court, of the receipt of said writ of error; and it shall be the duty of said Justice to at once convene said Supreme Court for the purpose of hearing said case, and said Supreme Court shall remand said case with directions or pass such final order as may be deemed proper and correct."

Georgia Code, 1933,
Sec. 27-2002:

"When cases tried and when continued.—Every person against whom a bill of indictment is found shall be tried at

the term of the court at which the indictment is found, unless the absence of a material witness or the principles of justice should require a postponement of the trial, and then the court shall allow a postponement until the next term of the court; and the court shall have power to allow the continuance of criminal cases from term to term, as often as the principles of justice may require, upon sufficient cause shown on oath. . . . . "

Georgia Code, 1933,
Sec. 59-803:

"Challenge to the array.—The accused may, in writing, challenge the array for any cause going to show that it was not fairly or properly impaneled, or ought not to be put upon him; the sufficiency of which challenge the court shall determine at once. If sustained, a new panel shall be ordered; if not sustained, the selection of jurors shall proceed."

Georgia Code, 1933,
Sec. 59-806:

"Questions on voir dire on trial for felony.—On trials for felonies any juror may be put upon his voir dire and the following questions shall be propounded to him, viz.:

"1. 'Have you, from having seen the crime committed, or having heard any of the testimony delivered on oath, formed and expressed any opinion in regard to the guilt or innocence of the prisoner at the bar?' If the juror shall answer in the negative, the following question shall be propounded to him:

"2. 'Have you any prejudice or bias resting on your mind either for or against the prisoner at the bar?' If the juror shall answer in the negative, the following question shall be propounded:

"3. 'Is your mind perfectly impartial between the State and the accused?' If the juror shall answer this question in the affirmative, he shall be adjudged and held a competent

juror in all cases where the offense does not involve the life of the accused; but when it does involve the life of the accused, the following additional question shall be put to him:

"4. 'Are you conscientiously opposed to capital punishment?' If he shall answer this question in the negative, he shall be held a competent juror: Provided, nevertheless, that either the State or the defendant shall have the right to introduce evidence before the judge to show that the answers, or any of them, are untrue; and it shall be the duty of the judge to determine upon the truth of such answers as may be thus questioned before the court."

Georgia Code, 1933,
Sec. 59-807:

"Setting aside juror for cause.—If a juror shall answer any of the questions set out in the preceding section so as to render him incompetent, or he shall be so found by the judge, he shall be set aside for cause."

Georgia Code, 1933,
Sec. 70-204:

"Newly-discovered evidence.—A new trial may be granted in all cases when any material evidence, not merely cumulative or impeaching in its character, but relating to new and material facts, shall be discovered by the applicant after the rendition of a verdict against him, and shall be brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial."

Georgia Code, 1933,
Sec. 70-301:

"Time of application; hearing, etc., in vacation; brief of evidence.—All applications for a new trial, except in extraordinary cases, shall be made during the term at which the trial was had; and when the term shall continue longer than 30 days, the application shall be filed within 30 days from the trial, together with a brief of evidence, subject to the

approval of the judge and subject to the right of amendment allowed in applications for a new trial; but all applications herein provided for may be heard, determined, and returned in vacation."

Georgia Code, 1933,
Sec. 70-303:

"Motion made after adjournment of court.—In case of a motion for a new trial made after the adjournment of the court, some good reason must be shown why the motion was not made during the term, which shall be judged of by the court. In all such cases, 20 days' notice shall be given to the opposite party. Whenever a motion for a new trial shall have been made at the term of trial in any criminal case and overruled, or when a motion for a new trial has not been made at such term, no motion for a new trial from the same verdict shall be made or received, unless the same is an extraordinary motion or case, and but one such extraordinary motion shall be made or allowed."